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SUPREME COURT OF THE UNITED STATES

October Term, 1937.

No. 447.

SCHUYLKILL TRUST COMPANY,
Appellant,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Brief of Appellant.

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I. Reference to the Official Reports of the Opinions Delivered by the Courts Below.

The opinions of the Court of Common Pleas of Dauphin County, delivered by President Judge Hargest are reported in 42 Dauphin County Reports 317, 297; 43 Dauphin County Reports 258, 260. (R. 100, 106; 152, 155).

The opinion of the Supreme Court of Pennsylvania delivered by Mr. Justice Stern is reported in 327 Pa. 127. (R. 187.)

II. The Grounds on which the Jurisdiction of this Court is Invoked.

Paragraph 1 of Rule 12 of this Court has been complied with.

A Statement as to Jurisdiction has been filed and printed.

III. Statement of the Case.

This is an appeal from the judgment of the Supreme Court of Pennsylvania affirming a judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

This court in an appeal between the same parties to No. 3, October Term, 1935, filed its opinion and entered its judgment reversing the judgment of the Supreme Court of Pennsylvania upon the ground that the statute in question in the instant appeal, the Act of April 25, 1929, Pamphlet Laws 673, was discriminatory and therefore unconstitutional, and remanded the cause for further proceedings not inconsistent with its opinion. (296 U. S. 113). The judgment of the Supreme Court of Pennsylvania from which the instant appeal is taken is said by the state court to be in compliance with the mandate of this court issued

in the cited appeal. A recital of the pertinent facts as they appear of record in both appeals is herein set forth.

The parties hereto were respectively the appellant and the appellee in an appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania, making a settlement of tax against the appellant for the tax and calendar year ending December 31, 1930, fixing the liability of the appellant for a tax in the amount of $1,441.39 under the alleged authority of the Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, Laws of Pennsylvania, 1929 (R. 155).

The appellant is a domestic corporation to which letters patent were issued under the law of the State of Pennsylvania upon October 17, 1887. It filed its report for the twelve months ending December 31, 1930, in the Department of Revenue as required by the Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673. Thereupon the Department of Revenue made a settlement of tax against it under the alleged authority of the said Act of Assembly in the amount of $2306.08 upon January 25, 1932 which was approved by the Department of the Auditor General January 26, 1932 (R. 4).

Subsequent thereto and in due course a petition for resettlement was filed which was refused by the said Departments of Revenue and of the Auditor General. Thereupon a petition for review was filed with the Board of Finance and Revenue, which Board made a resettlement of the tax under the alleged authority of the said act upon January 26, 1933, whereby tax was imposed in the amount of $2290.14, from which resettlement the appellant took an appeal to the Court of Common Pleas of Dauphin County. (R. 5).

Hearing was had in the said Court of Common Pleas of Dauphin County upon the said appeal upon an agreed statement of facts and after argument, said court upon

October 19, 1933 affirmed the settlement of tax made by the Board of Finance and Revenue and directed the entry of judgment nisi in the amount of $1719.71 together with costs and Attorney General's Commission thereon in a total amount of $1863.17, which judgment was made absolute November 24, 1933. (R. 59, 73).

Thereupon and in due course the appellant took an appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas of Dauphin County. Upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania, which court upon June 30, 1934 filed its opinion and directed the entry of judgment affirming the judgment of the court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Chief Justice Frazer (R. 73).

In due course an appeal was allowed to the Supreme Court of the United States, No. 3, October Term, 1935 (296 U. S. 113). (Opinion, R. 76).

The appeal was heard before this court and upon November 11, 1935 the opinion of the court was delivered and filed whereby the judgment of the state court was reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court. The judgment of the state court was reversed upon the ground that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which the judgment of the state Supreme Court was entered, was discriminatory in violation of the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States and the United States statutes recited in the Assignments of Error. (R. 76).

Upon February 11, 1936 the Commonwealth of Pennsylvania presented a petition to the Court of Common Pleas of Dauphin County praying the court to revise its original judgment entered November 24, 1933, which had been affirmed by the state Supreme Court June 30, 1934

and reversed by this court November 11, 1935, by entering judgment in favor of the Commonwealth and against the appellant in the amount of $2334.57 for tax imposed upon the full actual net asset value of the shares of stock of the appellant under authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640 and that such court issue a rule upon the appellant to show cause why such judgment should not be entered. February 11, 1936 the court issued a rule upon the appellant to show cause why the judgment prayed for should not be entered. (R. 94).

To such rule so made by the Dauphin County Court the appellant filed a demurrer praying the judgment of the court whether it should be required to make any answer to the petition and that it be hence dismissed with its reasonable costs in this behalf sustained. The causes of demurrer are fully set forth in the demurrer. The grounds thereof were, inter alia, that the Commonwealth was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement or to make a tax settlement under the Act of June 13, 1907, Pamphlet Laws 640, there being no such law in force in the State of Pennsylvania either at the time of the petition or during the tax and calendar year for which the tax settlement was originally made and for which the petition prayed that such settlement be made, and that the same constitutional defects which the Commonwealth admitted made void the Acts of April 25, 1929, Pamphlet Laws 673, May 7, 1927, Pamphlet Laws 853, and July 11, 1923, Pamphlet Laws 1071, made invalid and void the Act of June 13, 1907, Pamphlet Laws 640. (R. 95).

Oral argument was had upon the petition and demurrer. The Commonwealth contended that the Act of April 25, 1929, Pamphlet Laws 673 was unconstitutional and void and had been so held by the Supreme Court of the

United States and that the prior acts of May 7, 1927, supra, and July 11, 1923, supra, were likewise unconstitutional and void and that therefore a revision of the judgment should be made by the entry of judgment against the Schuylkill Trust Company under the first proviso of the Act of June 13, 1907, Pamphlet Laws 640, by denying all deductions. The appellant contended that judgment should be entered in its favor together with costs.

The Dauphin County Court overruled the demurrer filed by the appellant, without opportunity to file an answer to the petition, by such court's entering a judgment nisi upon April 20, 1936 imposing a tax together with interest and Attorney General's Commission in the amount of $1801.03 less costs expended in the Federal Court and allowed by said court in the amount of $344., the total judgment entered being $1,457.03. (R. 99). The judgment was based upon the same Act of April 25, 1929, Pamphlet Laws 673, after the court had amended it by allowing deductions in addition to those written in the statute by the legislature. (R. 100).

Thereafter in due course the appellant filed exceptions to the conclusions of law and judgment of the court, there being no dispute as to the facts which were set forth in the stipulations of facts filed at the time of the trial of the cause and before the entry of the original judgment dated November 24, 1933. (R. 127, 151).

January 18, 1937 the Dauphin County Court filed an opinion entitled "Opinion Upon Exceptions" wherein it states that it considered certain exceptions filed, that it had sustained some and overruled and modified others and thereupon proceeded to enter a new and differently formulated and calculated judgment in the amount of $1719.45, from which was deducted the hereinbefore referred to amount of costs in the sum of $344., the judgment entered being $1,375.45. The new formula and calculation were compounded of values, some stated to be "book value" and some "market value", a compound of figures and facts not

in evidence and not included in the Stipulation of Facts. The court in its opinion admits that its new and differing judgment is founded upon facts other than those upon which the tax settlement and the judgments of the state and federal courts were founded. (R. 152).

Subsequent thereto, finding that it had not ruled upon all of the exceptions, the court, upon January 22, 1937 filed another opinion entitled "Modified Judgment" wherein it is stated that the additional exceptions were overruled and proceeded to set forth the grounds of its final judgment which it entered upon such date, the judgment in this opinion being the sum of $1441.39 which was the amount of the tax, interest and Attorney General's commission, $1,785.39, less the hereinbefore referred to federal court costs of $344. The formula and calculation upon which this new judgment was based are a compound of facts not in evidence as was the basis of the earlier judgment directed to be entered January 18, 1937. (R. 155).

Thereupon and in due course the appellant took an appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas of Dauphin County. Upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania which court upon June 25, 1937 filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Justice Stern.

In due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, the appellant filed its Petition For Reargument July 2, 1937 and upon July 12, 1937 was notified that reargument had been refused July 7, 1937.

Subsequent thereto and in due course the appellant presented its petition for the allowance of an appeal to this court which was allowed August 20, 1937 by the Hon. Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

The settlement of tax made by the Court of Common Pleas of Dauphin County under the alleged authority of the said state statute of April 25, 1929, Pamphlet Laws 673, and the mandate of the Supreme Court of the United States issued in the case of Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, No. 3, October Term, 1935, 296 U. S. 113, which settlement of tax was embodied by the said court in a judgment entered against your petitioner January 22, 1937, which judgment was affirmed by the Supreme Court of Pennsylvania June 25, 1937, was made in accordance with the following method and calculation:

"Statement

"Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$466,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171"

(Manifestly the term, "Total", should be Taxable.)

The tax was calculated upon the said amount of $391,171. at the rate of five mills with a resultant tax in the amount of $1955.85 upon which credit was given for a payment on account of $570.43, leaving a balance due the Commonwealth in the amount of $1385.42. (R. 154). Upon such amount of $1385.42 interest was calculated from April 8, 1933 to January 22, 1937 in the amount of $314.95 making a total of $1700.37. Attorney General's commission was

calculated upon the said sum of $1700.37 in the amount of $85.02, making a total of $1785.39. From this sum so claimed to be due in the amount of $1785.39 there was deducted:

> "Less Costs allowed appellant in the Mandate of the Supreme Court of the United States, 344.00",

leaving a balance of $1441.39, which was the amount of the final judgment directed to be entered by the Dauphin County Court January 22, 1937. (R. 155).

In order that the meaning, intent and effect of this method of calculation applied and embodied in the final judgment of January 22, 1937, and its relationship to the prior judgments entered by the same court in this same case embodying differing methods of settlement and calculations may be made clear, they will be set forth in the order of their sequence:

The method of settlement applied by the taxing officials and affirmed by the original judgment of the Dauphin County Court entered November 24, 1933 and affirmed by the Supreme Court of Pennsylvania June 30, 1934 is set forth in the Stipulation of Facts (R. 14). This method of settlement and the judgment consequent upon its application was considered by this court and held void, for the reason that this Court held the statute under authority of which it was applied discriminatory and void. By this method of settlement, formula and calculation the taxing officials of the Commonwealth of Pennsylvania determined the actual value of each and all of the assets of the appellant. They determined the actual value of the amount of capital stock paid in, the surplus and undivided profits of the appellant, which was the actual value of the net assets of the appellant and was the difference between the actual value of the total assets and the amount of the liabilities. The actual value of the total assets was fixed at $3,755,882. The actual value of the amount of the

capital stock paid in, the surplus and the undivided profits was fixed at $466,914. Included among the total assets were shares of stock issued by corporations which, under the express language of the statute, were exempted from the tax imposed. These shares of stock are described and classified in the statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares. All of the shares of stock included within such class of shares exempted by the state statute were valued at $155,989., included within which class were Philadelphia National Bank shares of the value of $20,202. These shares are listed in Exhibit "2" which was made a part of Specification of Objection 7 in the appeal taken to the trial court and are listed also in the Stipulation of Facts filed with such court. (R. 12, 17).

The taxing officials then determined the value at which these exempt shares of stock of the actual value of $155,989. were taxed or relieved from tax or the capital stock of the corporations which issued them were taxed or relieved from tax under other taxing statutes of the state and fixed such value at $71,373., included within which were the said Philadelphia National Bank shares. (R. 18). They held that these shares of stock of the actual value of $155,989. were to be deducted from the amount of the capital stock paid in, the surplus and undivided profits at such portion of the said $71,373. as the amount of the capital stock paid in, the surplus and undivided profits bore to the value of the total assets and by such method fixed the amount of such deduction to be $8,886. The view of the taxing officials and the state courts was that the purpose of the exemption of such shares of stock under the language of the statute was to avoid double taxation (R. 56) and therefore since such shares of stock of the actual value of $155,989. had either been taxed or relieved from tax under other taxing statutes of the state or the corporations which issued them had been taxed or

relieved from tax upon their capital stock under other taxing statutes of the state, the appellant was not entitled to a deduction of the full value of these shares in the amount of $155,989. Thus did the state courts in their affirmation of the tax settlement and their construction and application of the state statute deny the claim of the appellant for the deduction of the whole actual value of the Philadelphia National Bank shares in the amount of $20,202. and the whole actual value of other tax-free shares in the total amount of $155,989.

The calculation in application of the theory of the taxing officials of the Commonwealth of Pennsylvania construing and applying the statute is set forth in the Stipulation of Facts (R. 15) and is as follows:

$$441{,}667. + 25{,}247. - \left(\frac{467{,}714.}{3{,}755{,}882.} \times 71{,}373.\right) = 458{,}028.$$

This calculation consists of the following elements: The sum, 441,667. + 25,247. or 466,914., was the actual value of the amount of the capital stock paid in, the surplus and undivided profits. From this sum of 466,914. was deducted the result of the calculation within the brackets, 8,886., with a resultant taxable value of 458,028. The numerator of the fraction 467,714., is the amount of capital stock paid in, the surplus and undivided profits. (There was a mistake in addition. The numerator 467,714., should have been 466,914. See Stipulation of Facts, R. 16; Statement of Counsel for the Commonwealth, R. 22.) The denominator of the fraction, $3,755,882., is the value of the total assets. The multiplicand, $71,373., is the taxed and exempt value of the tax-free shares of the actual value of $155,989., determined by the taxing officials as hereinbefore set forth. The portion of the said 71,373. subtracted as the result of the method of settlement and calculation was 8,886. and resulted in the sum

of 458,028. which was held to be the taxable value. The rate of tax, five mills, was thereupon applied to the said sum of $458,028. with a resultant tax settled against the appellant in the amount of $2,290.14.

There were included within the total assets of the appellant of the value of $3,755,882. national bank shares of the value of $20,202. which were included also within the class of exempt assets tax free under the statute of the whole actual value of $155,989. (R. 16, 17).

The only deductions allowed under the tax settlement made as the statute was construed and applied by the taxing officials and state courts were a deduction of the amount of the liabilities from the amount of the total assets which resulted in a fixing of the amount of the capital stock paid in, the surplus and undivided profits at $466,914. and a deduction from this latter sum of the said sum of $8,886., whereby a taxable value was determined in the amount of $458,028. The deduction of the full value of the said described shares of stock ($155,989.) was not allowed. The deduction allowed by reason of their ownership was $8,886., which is 5.6 per centum of their whole value. There was no deduction of the full value of national bank shares of the value of $20,202., which was included and listed in the said class of shares. (R. 14-19.) The only deduction allowed was such portion of the said $20,202. as the amount of capital stock paid in, the surplus and undivided profits bore to the total assets, to wit, a deduction of $2,515.,

$$\left(\frac{467{,}714}{3{,}755{,}882} \times 20{,}202. = 2515.\right),$$

which is 12.4 per centum of their whole actual value.

Among the total assets of the appellant of the value of $3,755,882. were United States securities of the value of $134,907., Philippine Islands bonds of the value of $10,900. and Joint Stock Land Bank bonds of the value of

$5,400. No deduction whatsoever was allowed by reason of the appellant's ownership of these assets.

The state courts in affirming the settlement made by the taxing officials held that the shares of stock to be deducted under the express language of the statute were to be deducted to the extent of such portion of their value which was taxed or exempted from tax under other state taxing statutes (in the instant case, $71,373.) as the amount of the capital stock paid in, the surplus and undivided profits bore to the total assets (in the instant case in the amount of $8,886.) for the reason, said the trial court, that under the statute "The sole purpose of this exemption clause was to avoid double taxation" (R. 56, 59). The state courts construed and applied the statute as directing the deduction of $8,886., 5.6 per centum of the whole actual value ($155,989.) of certain assets in order not to tax such portion twice, thereby construing and applying the statute as imposing a tax upon all assets not deducted, it being self-evident that if $8,886. of the value of assets were to be deducted in order to avoid double taxation, such assets as were not deducted were, in the opinion of the state courts, to be taxed once and that such was the intent and purpose of the statute. Hence it is that the state courts construed and applied the statute as imposing a tax upon the assets of the trust company less certain prescribed deductions and determined the amount of the tax liability by reason and on account of the kind of assets owned by the trust company and not upon the shareholders' interest in the shares of stock issued by the trust company.

In so holding the state courts ignored the fact that there was included within the said class of exempt shares of stock the national bank shares of the value of $20,202. and that the state was without authority to make such shares the basis for any other and further txation, the appellant being subject to tax upon such shares at their actual net asset value as the owner thereof under the

Pennsylvania Act of April 25, 1929, Pamphlet Laws 677. With reference to the United States securities, the Philippine Islands bonds and the Joint Stock Land Bank bonds, the state courts admitted that they were non-taxable assets, that the state was without authority to impose a tax upon them but held that they were not taxed, for the reason that, said they, the tax imposed by the said Act of April 25, 1929, Pamphlet Laws 673, was a tax upon shares qua shares, a tax upon the shareholders' interest in the shares issued by the appellant, and not a tax upon any of the assets owned by the appellant.

The appellant contended that the tax was not a tax upon shares as shares, that the statute expressly exempted certain assets owned by the trust company at their whole actual value and imposed the tax solely with reference to remaining assets and that therefore under the tax settlement there was not only a taxation of such non-taxable securities but also a discrimination against them, by reason of the exemption allowed to certain favored assets described in the statute. The appellant contended that the proper method of taxation in order to construe the state statute in conformity with the Acts of Congress and the Constitution of Pennsylvania and of the United States and thus carry out the intent of the state legislature was to determine the taxable value to which the rate of tax was to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares, and the full value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, and that when such method is applied the amount of the tax is $570.43, which the appellant paid (See Defendant's Request for Conclusion of Law 18, R. 31). The appellant contended also that, in addition to the fact that the statute as written and construed and applied to it imposed a tax upon assets, such statute as construed and

applied to it discriminated against the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds because they were not deducted and eliminated from consideration at their full actual value, although there was a deduction made of a portion of the value of the tax-free shares of stock exempted under the express language of the statute and that consequently the immunity of such United States securities and such bonds and federal instrumentalities was infringed and that the national bank shares being subject to tax under the Pennsylvania statute of April 25, 1929, Pamphlet Laws 677, could not be made the basis of any other or further taxation and therefore must of necessity be deducted at their full value and eliminated entirely from consideration in determining any tax imposed under the Act of April 25, 1929 Pamphlet Laws 673, the statute under consideration in the instant case.

Though the state supreme court affirmed the judgment of the trial court and held, upon authority of its earlier decision in the case of Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921) construing and applying the Act of June 13, 1907, Pamphlet Laws 640, that the appellant was not entitled to a deduction of the whole value of the shares of stock ($155,989.) made tax-free under the express language of the Act of April 25, 1929, Pamphlet Laws 673, and thus denied, in its construction and application of the said Act of 1929, supra, the claim of the appellant for the deduction of the full value of the national bank shares ($20,202.) owned by it, the state supreme court said that the question as to the claim and right of the appellant for the deduction of the whole value of the national bank shares was not raised in the original Specification of Objections filed with the trial court, was not discussed by the trial court and therefore would not be considered by it. This statement and conclusion of the state supreme court was erroneous and was

so held by this court (296 U. S. 113). This court held that the question was properly raised in the state courts and in the federal court, that the national bank shares as well as the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds were discriminated against and subjected to tax, that they were included in the measure of the tax and that therefore the statute was discriminatory in violation of the United States statutes recited in the Assignments of Error and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The state supreme court in its opinion filed in support of its last judgment does not hold that this question was not properly raised by the appellant. The ruling of this court upon this point being set forth at length in the opinion filed, the contentions of the appellant with reference thereto are not repeated herein. (R. 187, 81.)

Having held that the tax imposed by the said Act of 1929 was a tax upon the shares of stock issued by the appellant qua shares and that it was a tax upon the shareholders' interest in such shares, the state courts held that such tax was imposed upon shares owned by non-residents and their interest as well as those owned by residents of the State. The appellant contended that if the tax was a tax upon shares qua shares and upon the shareholders' interest in the shares, the state of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the situs of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contended that the decision of the supreme court of the

United States in the case of Corry v. Baltimore, 196 U. S. 466 (1905) did not support the conclusion of the state courts, the appellant having been incorporated under the laws of Pennsylvania October 17, 1887 (R. 19), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this state the situs for the taxation of shares of stock owned by non-residents, the law of the state as declared by the supreme court being to the contrary. (Commonwealth v. Standard Oil Co., 101 Pa. 119, 133 (1882).) The appellant contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case is an amendment, was construed by the supreme Court of Pennsylvania, in sustaining its constitutionality, as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied, (Commonwealth v. Mortgage Trust Company, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of this court in the cited case of Corry v. Baltimore, supra, there was no authority in the state to impose a tax upon the shares owned by non-residents. The ruling of this court upon this point was that it was unnecessary to pass upon this contention of the appellant in view of the grounds of the decision that the statute in question was discriminatory and therefore void.

Subsequent to the issuing of the mandate of the supreme court of the United States the Dauphin County Court directed the entry of a judgment against the appellant in the amount of $1457.03 upon April 20, 1936, which it held was entered in compliance with such mandate. (R. 106.) The amount of such judgment, it was said, was determined in accordance with the method of settle-

ment set forth in the judgment itself which was an erroneous application of the principles set forth in its opinion.

The Dauphin County Court held that the statute was unconstitutional and void as it had been applied theretofore but that it had the power to allow additional deductions which the state supreme court had theretofore held the legislature did not intend to allow and had not allowed by this statute. The Dauphin County Court held also that by allowing such additional deductions in the manner in which it was allowing them in the instant case not only was the statute made constitutional but there was also a compliance with the mandate of the supreme court of the United States. (R. 100.)

The Dauphin County Court held that the statute was to be applied by the application of the following method of settlement:

(1) That the full market value, that is, the actual value of national bank shares and Federal Reserve Bank shares was to be deducted from the amount of capital stock paid in, surplus and undivided profits (the net assets) in all cases, irrespective of whether or not they were investments of the amount of capital stock paid in, surplus and undivided profits. (R. 103, 105.)

(2) That neither the shares of stock defined in the said statute and exempted from tax by the language of such statute nor the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and other obligations of the United States government and its agencies and instrumentalities were to be deducted from the amount of capital stock paid in, surplus and undivided profits at their full actual value unless the trust company-owner of such assets established as a fact that they were wholly investments of the amount of capital stock paid in, surplus and undivided profits, that if it were not

shown that they were wholly such investments, then in the case of such assets, the court said, "a proportionate deduction is to be made". (R. 102, 105.)

(3) That the proportionate deduction was to be made according to the following formula (R. 104):

> "(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

(4) That in the case of the appellant, since it owned Philadelphia National Bank shares of the value of $20,202., the full value thereof was to be deducted, though it had not been shown that the national bank shares were wholly investments of capital stock paid in, surplus and undivided profits, and that, since the appellant had not shown that United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of an actual value of $151,207. and the shares of stock defined and exempted by the language of the statute exclusive of the said national bank shares of an actual value of $135,787. were purchased, were wholly investments of the amount of capital stock paid in, surplus and undivided profits, a proportionate deduction was to be made in the manner outlined.

At this point the Dauphin County Court was confronted with the fact that this method of settlement could

not be applied to the appellant because there was nothing in the record to show book values of assets, what was meant by book values, what was meant by permanent investments and what the permanent investments owned by the appellant were and their book value was. Nevertheless the Dauphin County Court proceeded as the statement of the calculation of its judgment shows in the record (R. 105). It applied the actual values of each and all assets though its formula outlined in its opinion was to the contrary. The judgment calculated was not determined in conformity with the method of settlement which the court approved and which it held complied with the mandate of the supreme court of the United States. It fixed the actual value of the amount of capital stock, surplus and undivided profits at $466,914.; it deducted the actual value of the national bank shares in the amount of $20,202.; it allowed a deduction of a portion of the actual value of the United States securities and a portion of the actual value of the remaining exempt shares of stock of a total value of $286,994. in the amount of $34,318. (R. 105.) It arrived at such sum of $34,318. by application of the following fraction:

$$\frac{446{,}712.}{3{,}735{,}680.} \times 286{,}944.$$

The numerator of the fraction, $446,712., is the actual value of the amount of capital stock paid in, surplus and undivided profits, $466,914., minus the value of the national bank shares, $20,202.

The denominator of the fraction, $3,735,680., is the actual value of all the assets as shown in the stipulation of facts (R. 15), $3,755,882., less the actual value of the national bank shares, $20,202.

The multiplicand of the fraction, $286,944., (should be $286,994., see R. 153), is the actual value of the United

States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, $151,207., plus the actual value of the shares of stock defined in the statute, $155,989., exclusive of the actual value of the national bank shares (R. 17) which had been deducted at their actual value of $20,202.

As the result of the foregoing there was deducted from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914., the full actual value of the national bank shares, $20,202., and the sum of $34,318. which was a portion of the actual value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the exempt shares of stock defined and exempted by the language of the statute exclusive of the actual value of the national bank shares of a total value of $286,994., the total deduction being $54,520. making the taxable value of the capital stock $412,394., with a resultant tax in the amount of $2,061.97. (See R. 105.)

Thereafter the court, seeing that it had determined a judgment by a method of calculation which did not apply the method of settlement which it had held in its opinion was a constitutional interpretation, construction and application of the statute and a compliance with the mandate of the supreme court of the United States and finding that there was no evidence of record as to book value of assets of the appellant, no evidence as to what constituted permanent investments, what the permanent investments were which were owned by the appellant and what the book values of permanent investments were (see Stipulation of Facts and Supplemental Stipulation of Facts, R. 14, 18), proceeded to change the valuations set forth in the method of calculation whereby it had in its prior judgment of April 20, 1936, determined the amount of the proportionate deduction for the exempt shares of stock defined in the language of the statute

and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds. (See opinion, R. 152, 155.) The court changed the numerator of the fraction from $446,712. to $418,650., which latter sum it says in its opinion "is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042., total $441,667, which are the book values less the book values of National Bank Shares, $23,017., making $418,650." (R. 153.) The court changed the denominator of the fraction from $3,735,680. to $2,158,045., which it says in its opinion (R. 153) is "the book value of permanent investments less the book value of those shares, if any, for which a full deduction has been made." The court said "that the permanent investments amount to $2,181,062., and after deducting the book value of the National Bank shares, $23,017, we get the denominator, $2,158,045." The court changed the multiplicand, $286,944. ($286,994.) to $286,121. The court said (R. 153), "Instead of the multiplicand used by us, $286,994., the correct multiplicand is $286,121. This error is accounted for by the fact that the tax value of the Pennsylvania Power & Light Company shares was taken instead of the book value, which is $800 less and the total book value of the exempt items amounts to $286,121.38. There was a mistake of $73.00 in that calculation. So that correctly adding the book value of the shares which are apportioned, the amount is $286,121 instead of the figure $286,994." (R. 153.)

After having made such alterations in the figures applying its formula the court proceeded to add the sum of $35., which latter sum it says is the "appreciation which should be added to the result of the fraction . . ." As a result of the foregoing the proportionate deduction calculation becomes (R. 154):

$$\frac{418{,}650}{2{,}158{,}045} \times 286{,}121 + 35 = 55{,}541.$$

The first fact to be noted is that there is no evidence whatsoever upon which to base any of the figures embodied within this new proportionate method of calculation. There were no such facts or factors as book values of assets of the appellant, what constituted permanent investments, what the permanent investments of the appellant were, if any there were, what their book or actual value was, considered by the taxing officers who made the tax settlement against the appellant. This is demonstrated by the record itself and is admitted by the Dauphin County Court and the state supreme court in the opinions filed in the case of Commonwealth v. Provident Trust Company of Philadelphia, 40 Dauphin Co. Repts., 146 (1935), 41 Dauphin Co. Repts., 1, (1935), 319 Pa. 385, (1935), in which sase it was said that in the year 1930, the year here in question, all settlements and methods of settlement and calculations were based upon actual values. (40 Dauphin, supra, 169.) There were no such facts or factors before the Dauphin County Court in the trial of this case and the entry of its original judgment, before the supreme court of the state of Pennsylvania when it entered its final judgment June 30, 1934, or before this court. Not only was there no such evidence but there was no hearing nor an opportunity for a hearing given the appellant upon such matter. The truth of these statements is established by the opinions of the court itself which appear of record (R. 100, 152).

As shown, the application of the new calculation fixes a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a portion of the value of the shares of stock exempted under the statute, exclusive of the national bank shares, of the total value of $286,994. at $55,541. Accordingly the Dauphin County Court upon January 18, 1937, applied its new calculation (R. 152, 154) and as a result thereof there was deduction from the actual value of the amount of the capital stock paid in, surplus and

undivided profits, $466,914., the actual value of the national bank shares, $20,202., the recited proportionate deduction of $55,541. or a total deduction of $75,743., thereby fixing the taxable value at $391,171. with a resultant tax in the amount of $1955.85.

Thereafter, finding that it had not ruled upon all of the exceptions filed by the appellant, the court entered its final judgment upon January 22, 1937, in the amount of $1441.39. (R. 155.) This final judgment differs from the judgment of $1375.45 entered January 18, 1937, solely in the amount of the interest calculation and Attorney General's Commission. All three of the judgments entered, the judgment of April 20, 1936, the judgment of January 18, 1937, and the final judgment of January 22, 1937, allow as a deduction the costs which the mandate of this court stated were to be paid to the appellant in the amount of $344. These costs, as the final judgment shows, are allowed as a deduction from a sum which includes interest calculated to January 22, 1937, as a result of which not only was a judgment entered against the appellant for taxes but the appellant was charged interest upon costs which were owing to it from the date of the decision of the supreme court of the United States, November 11, 1935, to January 22, 1937.

The supreme court of the state of Pennsylvania affirmed the final judgment which the lower court entered January 22, 1937, in favor of the Commonwealth and against the appellant in the amount of $1441.39 and filed its opinion June 25, 1937. Its opinion is nothing more than an approval of everything done by the Dauphin County Court. (R. 187.)

The Dauphin County Court and the state supreme court held that the tax imposed by the said statute was a tax upon the shares issued by the appellant qua shares, that it was a tax upon the shareholders' interest in the shares, that it was imposed upon the shares owned by

non-residents and their interest in such shares as well as those owned by the residents of the state. The appellant contended that if the tax was a tax upon shares qua shares and upon the shareholders' interest in the shares, the state of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the situs of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contended that the decision of the supreme court of the United States in the case of Corry v. Baltimore, 196 U. S. 466 (1905) did not support the conclusion of the state courts, the appellant having been incorporated under the laws of Pennsylvania October 17, 1887 (R. 19), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this state the situs for the taxation of shares of stock owned by non-residents, the law of the state as declared by the supreme court being to the contrary. (Commonwealth v. Standard Oil Co., 101 Pa. 119, 133 (1882).) The appellant contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case, is an amendment, was construed by the supreme court of Pennsylvania, in sustaining its constitutionality, as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied, (Commonwealth v. Mortgage Trust Company, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the supreme court of the United States in the cited case of Corry v. Baltimore, supra, there was no authority in the

state to impose a tax upon the shares owned by non-residents.

The appellant also contended that this court in its decision filed November 11, 1935, had held that none of the shares of stock issued by the appellant was taxable for the reason that the state statute of 1929 was discriminatory and therefore unconstitutional and void and that it had so declared in its opinion. (R. 76.)

The sole difference between the original judgment entered by the Dauphin County Court November 24, 1933, affirmed by the opinion and judgment of the state supreme court June 30, 1934, from which judgment the appeal was taken to the supreme court of the United States, and this latest judgment of the state supreme court which is said to be a compliance with the mandate of the supreme court of the United States is an increase in the amount of the deductions allowed by reason of the appellant's ownership of national bank shares, United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, the deduction allowed being a deduction of the full value of the national bank shares and a deduction of a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute, such portion being 19 per centum of their entire value.

The state courts now hold that the statute as it is now construed and applied in the tax settlement embodied in the judgment entered against the appellant is constitutional and complies with the mandate of the supreme court of the United States. The state courts adhere to the conclusion that under the new method of settlement there is no taxation of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute and no discrimination against such assets though the state courts adhere to the

application of the "proportionate" method of settlement whereby only a portion of non-taxable and exempt assets are deducted and wherein the entire value of non-taxable assets such as national bank shares and Federal Reserve Bank shares are deducted despite the fact that there is no distinction or difference in degree of exemption and non-taxability between these various assets. The appellant contended that the discrimination between these assets is manifest and the violation of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States is clear.

The state courts hold that they have the power to amend the statute by allowing additional deductions and changing the method of settlement though such amendment of the statute and change in the method of settlement are contrary to every decision of the state courts to and including the final decision of the state supreme court filed June 30, 1934, from which the first appeal was taken to this court. The state courts hold that the tax is a tax upon shares qua shares and that there is constitutional authority to tax the shares of non-resident shareholders though it is manifest that the statute is a revenue statute and not a statute regulating the issuing of the shares of stock of a domestic corporation.

The appellant contended that the "proportionate" method of settlement whereby a portion of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted under the express language of the statute was deducted imposes tax upon such securities, bonds and shares of stock, that such taxation is the necessary result of the application of such method of settlement, that the formula and calculation includes the value of such assets in the denominator of the fraction used to determine the portion of such assets to be deducted, the value of the

United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted in the express language of the statute being included within the denominator of the fraction set forth in the judgment entered against the appellant, to wit,

$$\frac{418,650.}{2,158,045.}$$

, it being self-evident that the larger the denominator of such fraction the less will be the amount of the deduction allowed and the less the amount of the deduction the larger the amount of tax imposed.

The appellant contended that the discrimination against the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted by the express language of the statute is likewise self-evident, for the method of settlement approved in the Girard Trust Company case (R. 106-126), and in the instant case (R. 154) requires that the full value of national bank shares and Federal Reserve Bank shares, both of which are shares of stock which are included within the shares of stock defined, described and exempted under the express language of the statute, be deducted in all cases and only a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the other members of the class of shares of stock defined and exempted under the express language of the statute is required to be deducted unless it can be established as a fact by the trust company-owner that such assets are wholly investments of the amount of capital stock paid in, surplus and undivided profits. The appellant contended that it is self-evident that if the entire value of national bank shares and Federal Reserve Bank shares be deducted in order that they might not be included in the measure of the tax, a deduction of the entire value of

all non-taxable and exempt assets is required in order that they be not taxed and be not discriminated against.

The appellant contended that there is no authority in the state courts to make a tax settlement against it, for the reason that the supreme court of the United States, federal questions having been raised, upon appeal held that the statute was void because discriminatory, that such decision of the federal court was final and that there was no authority in the state courts to amend the statute by allowing additional deductions, that the allowance of such additional deductions was judicial legislation in violation of Section 1, Article IX, and Section 1, Article II, of the Constitution of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The appellant contended that under the decision and mandate of the supreme court of the United States judgment should have been entered for the appellant with costs.

IV. Specification of Errors.

1. The Supreme Court of Pennsylvania erred in that its final judgment affirming the final judgment of the Court of Common Pleas of Dauphin County is not a compliance with the mandate of the Supreme Court of the United States. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

2. The Supreme Court of Pennsylvania erred in not directing judgment to be entered in favor of the Schuylkill Trust Company, Appellant, and against the Commonwealth of Pennsylvania, together with costs. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

3. The Supreme Court of Pennsylvania erred in that its final judgment affirming the final judgment of the Court of Common Pleas of Dauphin County construing

and applying the Act of April 25, 1929, Pamphlet Laws 673 constitutes judicial legislation, the Supreme Court of the United States upon appeal, federal questions having been raised, having held the said Act of April 25, 1929, Pamphlet Laws 673 discriminatory, unconstitutional and void. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

4. The Supreme Court of Pennsylvania erred in that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment, is discriminatory, unconstitutional and void in violation of the federal statutes and the state and federal constitutional provisions recited in the Assignments of Error. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

5. The Supreme Court of Pennsylvania erred in holding that the Act of April 25, 1929, Pamphlet Laws 673, as construed and applied by it after such court had written into the statute, subsequent to the decision of the Supreme Court of the United States, words allowing deductions in addition to those written into it by the legislature was constitutional and did not impose a tax upon United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the federal statutes cited in Assignments of Error Nos. 1 to 16, inclusive. (R. 228-239.)

6. The Supreme Court of Pennsylvania erred in holding that the Act of April 25, 1929, Pamphlet Laws 673 as construed and applied by it after such court had written into the statute, subsequent to the decision of the Supreme Court of the United States, words allowing deductions in addition to those written into it by the legislature was constitutional and did not discriminate against

United States securities, Philippine Islands bonds and Joint Stock Lank Bank bonds in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the federal statutes cited in Assignments of Error Nos. 1 to 16, inclusive. (R. 228-239.)

7. The Supreme Court of Pennsylvania erred in holding that the Act of April 25, 1929, Pamphlet Laws 673 as construed and applied by it in the tax settlement made against the appellant by a method of settlement wherein and whereby the tax liability is determined by the kind of assets owned by each trust company without regard to the value of the shares issued by it and the value of the shareholders' interest in the shares, as a result of which the amount of tax is increased by reason of the appellant's ownership of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds was constitutional and did not violate Clause 2 of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the federal statutes cited in Assignments of Error Nos. 1 to 16, inclusive. (R. 228-239.)

8. The Supreme Court of Pennsylvania erred in that it construed and applied the Act of April 25, 1929, Pamphlet Laws 673, in the tax settlement made against the appellant as imposing a tax upon shares qua shares, upon the shareholders' interest in the shares, owned both by residents and non-residents of the State of Pennsylvania, and that the statute so construed and applied was constitutional and did not violate Section 1 of the Fourteenth Amendment to the Constitution of United States. (Assignments of Error Nos. 1 to 16 inclusive.) (R. 228-239.)

9. The Supreme Court of Pennsylvania erred in that it construed and applied the Act of April 25, 1929, Pamphlet Laws 673, in the tax settlement made against the appellant as imposing a tax upon the shares of stock issued by the appellant qua shares owned by non-residents of the State and that the statute so construed and applied was constitutional and did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Assignments of Error Nos. 3, 10, 13.) (R. 229, 235, 238.)

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1. General Statement.

By the judgment of the state Supreme Court entered June 30, 1934, which judgment was reversed by this court

November 11, 1935, a deduction of $8,886. was allowed from the value of the net assets of the trust company to determine the taxable value of the shares in the amount of $458,028. (R. 16, 79.)

This deduction of $8,886. was 5.6 per centum of the value of the shares of stock defined in the said statute of April 25, 1929, Pamphlet Laws 673 as "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares" owned by the appellant of the total value of $155,989., no deduction being allowed for the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned by the appellant of the total value of $151,207. (R. 17, 74, 81.)

By the judgment of the state Supreme Court entered June 25, 1937, from which judgment the instant appeal was allowed, a deduction of $75,743. was allowed from the value of the net assets of the appellant to determine the taxable value of the shares in the amount of $391,171. (R. 154.)

This deduction of $75,743. consisted of the value of naitonal bank shares in the amount of $20,202. and the sum of $55,541., which sum of $55,541. is 19 per centum of the value of the shares of stock defined in the said statute of April 25, 1929, Pamphlet Laws 673 as "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares", (exclusive of the said value of the national bank shares), owned by the appellant of the total value of $135,787. and 19 per centum of the value of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of the total value of $151,207. (R. 154.)

The record establishes the fact that the sole difference between the judgment entered June 30, 1934, and the judgment entered June 25, 1937, which it is said is a com-

pliance with the mandate of this court, is one of fact and that fact is that under the judgment entered June 30, 1934, there was no deduction allowed by reason of the appellant's ownership of the said United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and a deduction was allowed of a portion of the value of the national bank shares and under the said judgment entered June 25, 1937, there was a deduction allowed in the amount of 19 per centum of the value of the said United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and a deduction of the full value of the said national bank shares. (R. 154.)

The method of settlement which was applied to determine the amount of the judgment entered June 25, 1937, is, as was the method of settlement applied in determining the amount of the judgment entered June 30, 1934, the "proportionate" method. The purpose and the effect of the application of the "proportionate" method of settlement is to eliminate but a portion of the assets to which it is applied. Such is its effect under both judgments entered by the state Supreme Court. (R. 73, 187.)

Under both judgments entered by the state Supreme Court tax is imposed, as the opinions declare, upon shares of stock owned by non-residents of the state. (R. 75, 187.)

The appellant contends (1) that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which the judgment was entered by the state Supreme Court, is unconstitutional and void, that it was so held by this court by its decision filed November 11, 1935, in an appeal between the same parties to No. 3, October Term, 1935, (296 U. S. 113); (2) that a compliance with the mandate of this court required that the state Supreme Court direct the entry of judgment for the appellant with costs; (3) that the state Supreme Court and the Dauphin County Court, the judgment of which was affirmed by the state

Supreme Court, were without constitutional authority to amend the said statute by writing into it words allowing deductions in addition to those written into it by the legislature and that such amendment of the statute is judicial legislation forbidden by both state and federal constitutions; (4) that the said Act of April 25, 1929, Pamphlet Laws 673, as amended by the state courts is unconstitutional and the judgment entered under its authority is void for the reason (a) that the said statute as amended by the state courts imposes a tax upon United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds; (b) that the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds are discriminated against; (c) that the operation and effect of the statute as amended and applied to the appellant by the judgment entered against it by the state Supreme Court is to impose a tax upon assets of trust companies, not upon shares of stock issued by them qua shares in the hands of their owners; (d) that if the tax be a valid tax imposed upon the shares issued by the appellant qua shares there is no constitutional authority in the state to impose such tax upon non-resident shareholders ; (e) that as a consequence of the construction and application of this statute as it has been amended by the state courts it violates the constitutional provisions and federal statutes specified in the Assignments of Error; (f) that there is no authority in the state courts to use book values of assets instead of actual values and that there is no evidence of record of the book values which were used in the method of settlement applied to determine the amount of the judgment entered against the appellant, and (g) that these questions were raised before and ruled upon by the state trial court and state Supreme Court.

The state Supreme Court, as its opinion discloses, based its judgment upon the opinion of the Dauphin County Court and made the reasoning of the latter court

its own. The state courts, as their opinions disclose, admit the unconstitutionality of the said statute but hold that they had authority to amend the statute by allowing additional deductions and that by allowing such additional deductions in the manner and by the method of settlement which such courts applied to the appellant they had made the statute constitutional and complied with the mandate of the Supreme Court of the United States, that the tax imposed by the statute as thus amended by the state courts was upon shares qua shares and that the state had constitutional authority to impose such tax upon the shares of stock owned by non-residents of the state.

2. The judgment of the Supreme Court of Pennsylvania does not comply with the mandate of the Supreme Court of the United States.

The judgment of the Supreme Court of Pennsylvania does not comply with the mandate of the Supreme Court of the United States for the reason that this court held, as its opinion discloses, that the state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settlement was made and the judgment entered, was discriminatory, that the burden of the tax was increased by reason of the ownership of United States securities, that the statute discriminated against United States securities solely by reason of ownership of such securities and for such reason was the judgment reversed. It was for such reason, this court said, that it was not necessary to consider the contention of the appellant that if the tax were a tax upon shares qua shares the state was without constitutional authority to impose a tax upon the shares of stock owned by non-residents.

The conclusion that the state statute is unconstitutional and void was admitted in the petition filed by the Commonwealth upon which the rule to show cause was issued by the Dauphin County Court upon February 11,

1936, after the mandate of this court had issued, the rule to show cause why judgment should not be entered by the court's making a tax settlement against the appellant under the authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640. (R. 94.)

This conclusion is admitted also by the Dauphin County Court in its opinion filed in support of its judgment entered April 20, 1936, the court, despite the decision of the state Supreme Court filed June 30, 1934, and the final and conclusive decision of this court filed November 11, 1935, holding that it had the power to change the meaning of the statute and the intention of the legislature and thereby the application of the statute made by the taxing officials, its original judgment and the recited judgments of the state Supreme Court and of this court. (R. 100.)

Such conclusion of the Dauphin County Court was affirmed by the state Supreme Court.

The Commonwealth and both state courts were in agreement upon the conclusion that the statute as it was enacted by the state legislature was unconstitutional and void.

It is respectfully submitted, therefore, that the judgment of the state Supreme Court is not a compliance with the mandate of this court, that the judgment of the state Supreme Court should be reversed and that judgment should be directed to be entered in favor of the appellant with costs.

3. The judgment of the Supreme Court of Pennsylvania constitutes judicial legislation.

As hereinbefore stated, after the decision of this court and the receipt of its mandate to the state Supreme Court, the Commonwealth presented a petition to the Dauphin County Court praying for the entry of judgment in favor of the Commonwealth and against the appellant by the

court's making a settlement of tax against the appellant for the tax and calendar year in question under authority of the first proviso of the Act of June 13, 1907, P. L. 640. (R. 94.)

The petition was predicated upon the conclusion that the Act of April 25, 1929, P. L. 673, is unconstitutional and void and that the appellant was under no liability for the payment of tax based upon a settlement made under authority of such statute.

Upon this petition the court entered a rule upon the appellant to show cause why such judgment should not be entered. To this rule the appellant filed a demurrer reserving the right to answer. (R. 95.) The causes of demurrer were fully set forth therein, the grounds thereof being, inter alia, that the petitioner was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement, no authority to make a tax settlement under the Act of June 13, 1907, P. L. 640, there being no such statute in force in the state either at the time of the filing of the petition or during the tax and calendar year for which the tax settlement was originally made and for which the petitioner prayed that the settlement be made by the court, that the same constitutional defects which the Commonwealth admitted made the acts of April 25, 1929, P. L. 673, May 7, 1927, P. L. 853 and July 11, 1923, P. L. 1071, invalid and void made invalid and void the Act of June 13, 1907, P. L. 640, that the court was without any statutory or constitutional power to revise its judgment entered under the alleged authority of the Act of April 25, 1929, P. L. 673 by striking off such judgment and substituting in lieu of it a judgment for the tax claimed to have been imposed under authority of another act of assembly under the authority of which no tax was imposed in the said year against any trust company in the state, that, if the 1907 statute were applicable, the substantial provision of such statute (referred to in this Brief as the

second proviso) imposed the tax and by its terms, whicl are the precise terms of the 1923 statute and are embodiec in the express terms of the 1927 and 1929 statutes, the judgment is similarly discriminatory as that which was entered under authority of the unconstitutional 1929 statute, that the entry of the judgment prayed for imposed a tax upon both resident and non-resident shareholders of the appellant with consequent violation of federa statutes and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Con stitution of the United States.

Argument was had upon this petition and demurrer Thereafter the Dauphin County Court upon April 20, 1936 (R. 99; 42 Dauphin Co. Repts. 317), without allowing the filing of an answer, directed the entry of a judgment under the alleged authority of the same Act of April 25 1929, P. L. 673, against the appellant in the amount of $1,457.03, filing its opinion April 24, 1936. To this nisi judgment the appellant filed exceptions. The lower court upon January 18, 1937, filed an "Opinion Upon Excep tions" (R. 152; 43 Dauphin Co. Repts. 258) wherein it sus tained and modified some of the exceptions and overruled others and directed the entry of judgment in the sum of $1, 375.45 upon alleged facts not of record. Thereafter, finding that it had not ruled upon all of the exceptions, the court filed another opinion entitled "Modified Judgment", over ruled the remaining exceptions and upon January 22, 1937 entered its final judgment directing the entry of judgmen against the appellant in the amount of $1,441.39 (R. 155; 4 Dauphin Co. Repts. 260). The Dauphin County Court re fused to make a tax settlement under the Act of June 1 1907, P. L. 640, as the Commonwealth petitioned, upon th ground that such statute was unconstitutional (R. 121).

The Dauphin County Court stated that the Acts o April 25, 1929, P. L. 673, May 7, 1927, P. L. 853 and Jul 11, 1923, P. L. 1071 were "unconstitutional as 'construe

and applied by the Department and the courts' in the settlement in this case" and thereupon proceeded to declare a different intention of the legislature with a consequent different construction of the said Act of April 25, 1929. The court announced the intention of the legislature in its enactment to have been different from that which it had held to be the intention in its first judgment which the state Supreme Court affirmed in its decision filed June 30, 1934.

The thought of the Dauphin County Court is that, though the court of last resort of the state construed the act of 1929 by declaring and applying the intent of the legislature in its enactment to the facts and though such statute was held by this court to be in violation of federal statutes and of the federal constitution, nevertheless, it, the court of first instance, can thereafter declare the meaning and intent of the legislature to have been diametrically opposite to that which had been held and applied theretofore, and thereupon apply such new intention of the legislature by making a new tax settlement and embody such settlement in a judgment against the appellant; and furthermore that it can predicate such settlement and judgment upon an alleged different state of facts not in evidence and by a method of tax settlement differing from that applied to all other trust companies in the same tax year though the language of the statute was the same upon April 20, 1936, January 18, 1937 and January 22, 1937, the date of its new judgment, as it was upon November 24, 1933, the date upon which it entered its original final judgment.

The Dauphin County Court recognized that this court held the statute discriminatory and therefore unconstitutional and void. Upon this fact is its decision based. The court, however, proceeded upon the theory that by the exercise of judicial power vested in it as a court it can, in the case of a statute which violates federal statutes and the federal constitution and has been so held by the

United States Supreme Court, make the statute constitutional by the declaration of an intent on the part of the legislature in the enactment of the statute different from the intent which had been judicially declared by *the state and United States supreme courts,* embodied in a judgment affirmed by the state Supreme Court and upon review reversed by the United Ctates Supreme Court and *can effectuate such different intent by adding words of limitation to the statute.* That such an exercise of power by a court is itself unconstitutional and therefore void cannot admit of doubt, for such action of the court is that of a law-making body; the power exercised by the Dauphin County Court by its judgment is a legislative power (State Constitution (Art. II.).) *Its new judgment amends the Act of 1929.* One might stop here without more, for a reading of the opinion and judgment of the county court entered October 19, 1933, the decision and judgment of the state Supreme Court entered June 30, 1934, and the decision and judgment of the Supreme Court of the United States entered November 11, 1935 are conclusive of the matter.

Keeping in mind the fact the state Supreme Court affirmed the reasoning and judgment of the county court, note the reasons which the Dauphin County Court assigns in support of its power to amend the statute by the exercise of the judicial process. The reasons are set forth at length in Commonwealth v. Girard Trust Company (R. 106) 42 Dauphin County Reporter 297, (327 Pa. 135 (1937)) and in its opinion in the instant case. An analysis of these reasons discloses that they not only do not support the conclusion of the court but, rightly understood, invalidate such conclusion.

The intent of the legislature in its enactment of these various statutes, the acts of 1907, 1923, 1927 and 1929; is neither obscure nor latent. In the 1907 statute the legislature prescribed two measures of the tax, one, which is referred to in this brief as the second proviso, was made

applicable to all trust companies; the other, referred to in this brief as the first proviso, was made applicable to such trust companies as had not paid their tax in accordance with the measure prescribed in the second proviso on or before March 1 of each year. The measure of tax in the first proviso permitted no deductions. The taxable value was the net asset value. The second proviso allowed deductions from the value of the net assets. The character of the assets, the value of which was to be deducted, is defined: The deductible assets were the shares of stock of corporations liable to pay a capital stock tax and the shares of stock of which had been taxed. They are precisely those of the 1923 statute. These deductions were allowed, as judicial decision shows, for the purpose of avoiding double taxation, the capital stock of a corporation and the shares of stock issued by such corporation being regarded for taxation purposes as identical. These were the sole deductions allowed by the 1907 and the 1923 statutes until by the Act of 1927 additional deductions were allowed in accordance with the state taxation policy of imposing no tax upon the capital stock of or the shares issued by manufacturing, laundering and meat packing corporations.

Judicial decision declared the express deductions allowed to be the sole deductions. Expressio unius est exclusio alterius. This conclusion has been adhered to by the state Supreme Court. It was declared in the decision of such court in the case of Commonwealth v. Mortgage Trust Co., 227 Pa. 163 (1910) and reaffirmed whenever questioned. In the recent decision in the Provident Trust Company case (Com. v. Provident Trust Co. of Phila., 40 Dauphin Co. Repts. 146 (1935)) the Dauphin County Court, upon whose opinion the state Supreme Court affirmed the judgment of the lower court, (319 Pa. 385) sets forth at length and quotes from the opinion of Judge Sadler in the Hazelwood Savings & Trust Co. case to such

effect (23 Dauphin County Repts. 244; 271 Pa. 375 (1921).) The Provident Trust Company and Hazelwood Savings and Trust Company decisions are reaffirmed by the state Supreme Court in its decision of June 25, 1937, in the instant case. (R. 192.)

The Act of 1923 made the measure of tax of the second proviso of the Act of 1907 the sole measure of the tax. The legislature passed the acts of 1923, 1927 and 1929 in the light of judicial decision declaring the meaning of then existing statutes. Indubitably the act of 1927, in so far as the measure of the tax was concerned, was enacted for the purpose of changing the measure of the tax by allowing additional deductions. The additional deductions were the shares of stock of the corporations which were relieved from the payment of capital stock tax and the shares of stock which were relieved from the payment of tax. The capital stock of and the shares of stock issued by manufacturing, laundering and meat-packing corporations had been exempted from tax under the taxation policy of the state in order to foster their growth. The purpose of the allowance of additional deductions was to exclude the shares of such corporations from the measure of the tax and thereby not tax them. The legislature regarded the inclusion of such shares in the measure of the tax as taxing them and therefore directs their deduction. The Act of 1929 did not change this measure of tax. The foregoing is conclusively established by the decision of the state Supreme Court in the instant case filed June 30, 1934, and the decision of the Supreme Court of the United States filed November 11, 1935.

Additional confirmation of what has been said as to the intent of the legislature is found in the Act of May 31, 1933, P. L. 1132. This act amends the 1929 act and reaffirms the intent declared in the earlier statute, for the amendment sets forth in terms the method of determining the measure of tax whereby the deduction of

the favored shares of stock expressly defined in the 1929 act and these alone is to be made. Such method is that which the taxing officials applied to trust companies in the year 1930 including this appellant.

The Act of July 28, 1936, P. L. 73 enacted since the decision of the United States Supreme Court reaffirms what has been said, for by it the legislature allows no deductions and fixes the measure of tax at the value of the net assets of the corporation.

The 1936 statute and its predecessors of 1907, 1923, 1927, 1929 and 1933 demonstrate the conclusions (1) that the legislature intended the deduction of no assets other than the shares defined in the statutes and expressly allowed thereby, (2) that the prescribing of the measure of the tax is a legislative function, (3) that to increase or to diminish the deductions from the net assets is to amend the statute and (4) that to amend the statute is to legislate, a power vested solely, under the Constitution of the state, in the General Assembly. (Article II of the State Constitution.)

How does the state court arrive at its conclusion? At length and with the citation of numerous authorities and quotations from many decisions the court declares that when the state imposes a tax upon a subject of taxation and does so by the use of what the court styles "all-inclusive" language, the legislature means all of the subject within the state taxing jurisdiction, that the "all-inclusive" language means "all" of the subject within the state taxing power and no more, as, for example, says the court, when the state imposed a tax upon the capital stock of a corporation it meant all of the capital stock, that is all of the assets of the corporation within the state taxing jurisdiction. It did not mean all of the assets owned by the corporation wheresoever situate. Similar illustration does the court use with reference to certain other taxing statutes.

Having arrived at this point, the court concludes that therefore by the Act of 1929 the legislature meant a measure of tax determined by allowing the deduction of all non-taxable assets owned by the trust company, that in addition to the assets directed in express terms to be deducted all non-taxable assets were to be deducted. This includes the deduction of all tangible property, real and personal, located outside of the state, all intangible property such as United States bonds and the bonds and shares of stock of agencies and instrumentalities of the United States government. This, *now* says the court, is what the legislature meant; such we now see, says the court, is its intention by the use of its language though the intention was the contrary from June 13, 1907, the date of the enactment of the 1907 statute, down to and including November 11, 1935, the date upon which the Supreme Court of the United States held the 1929 statute unconstitutional. Though such a contrary intent made the statute unconstitutional, the fact of unconstitutionality, so holds the state court, established a new intent on the part of the legislature in its enactment of this 1929 statute, a new intent which became effective by virtue of the decision and judgment of the United States Supreme Court entered November 11, 1935.

Such ruling by the state court nullifies its conclusion. When we come to apply this rule of "all-inclusive"-language-standard determinative of legislative intent to the Act of 1929 we find that there is no such "all-inclusive" language in the statute. On the contrary the language is restrictive. Certain assets are excluded from the measure of tax and such assets alone. The language of the statute is "so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares."

The state law-making body by the statutes of May 31, 1933, P. L. 1132 and July 28, 1936, P. L. 73 has given express denial to this conclusion of the lower court and to every premise upon which its conclusion has been founded. The 1933 act was in force when the lower court entered its first judgment upon November 24, 1933, with which statute such judgment conformed, for the method of settlement applied under the 1929 statute is prescribed in terms by the 1933 statute.

The invalidity of the conclusion of the state court as to the meaning of the use of general language in a statute and the power of a court to restrict such language by construction is shown by the decision of the United States Supreme Court in Trade-Mark Cases, 100 U. S. 82 (1879).

When one considers the language of the statute and the hereinbefore cited decisions, is it not clear that what the state court has done is to amend the Act of 1929 and that it exercised such power of amendment by its final judgment of January 22, 1937?

To allow additional deductions or to deny all deductions is to change the measure of the tax. To add deductions is to lessen the tax in cases of trust companies owning the kind of assets thus deducted and to discriminate against trust companies and their shareholders owning no such exempt assets. To deny all deductions is to increase the tax. The power to raise or lower tax is the power to determine tax liability; it is the power of taxation. Such power is vested in the legislature alone.

The state court has amended the statute by adding words of limitation thereby changing the measure of the tax. It has put words in the statute which were intentionally omitted, for the language of the statute and judicial decisions declare that the sole deductions were the shares of stock defined in the statute. As in the 1907, 1923 and 1927 acts so in the Act of April 25, 1929, P. L. 673 were the deductions confined to the shares of stock

defined in the express terms of each of these statutes. (Commonwealth v. Trust Co., 227 Pa. 163 (1910); Commonwealth v. Trust Co., 237 Pa. 353 (1912); Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921); Commonwealth v. Schuylkill Trust Co., 315 Pa. 429 (1934); Commonwealth v. Provident Trust Co., 319 Pa. 385 (1935); Schuylkill Trust Co. v. Commonwealth, 296 U. S. 113 (1935).)

To change the measure of tax is to legislate. A court "cannot put words into an act which the legislature has omitted—and, presumably, designedly so— for the purpose of making it valid. That would be legislation—making the law rather than declaring it. In other words, the power to strike an unconstitutional clause out of an act is a very different thing from the power to insert one in an act to make it constitutional. The one is judicial, the other legislative." (Dundee Mortge. etc. Invest. Co. v. School Dist., 21 Fed. 151 (1884),) ". . . courts cannot by an act of judicial legislation add words of limitation to a statute expressed in general terms in order to sustain it, when its operation on the subject-matter embraced in its terms is unconstitutional." U. S. v. Reese, 92 U. S. 214 (1876); U. S. v. Steffens, 100 U. S. 82 (1879); U. S. v. JuToy, 198 U. S. 253 (1905); Anderson v. Louisville, etc. R. Co., 62 Fed. 46 (1894); Chicago, etc. R. Co. v. Westby, 178 Fed. 619 (1910); Illinois Cent. R. Co. v. McKendree, 203 U. S. 514 (1906).

In the Trade-Mark Cases, 100 U. S. 82 (1879) it was held that "It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear", that there is no power in the court to introduce words of limitation into a statute in order to make it specific and thereby constitutional.

In the instant case there is not even a pretense that the words of the 1929 state statute convey or were in-

tended to convey the meaning given to this statute by the Dauphin County Court in its new judgment. Decisions of the Dauphin County Court and of the state Supreme Court and of the Supreme Court of the United States are expressly to the contrary. Words are put into the statute solely because the statute has been held unconstitutional. Would the new meaning and intent have been given if the Supreme Court of the United States had not held the statute unconstitutional? Because the statute is unconstitutional the state court proceeds to amend it because the court is of the opinion that by introducing words of limitation changing the measure of the tax, the statute becomes constitutional. This is not judicial process. It is judicial legislation. It is the exercise of law making power by a court which acquired appellate jurisdiction under Article XI, Section 1104 of the Fiscal Code, state statute of April 9, 1929, Pamphlet Laws 343. It is legislation upon a subject which is within the sole province of the legislature, namely, the exercise of the sovereign power of taxation. The court has no power of legislation and therefore its judgment is void and, though it had the power of legislation, the statute as it has been amended is unconstitutional and void. These conclusions are argued herein and reference is made to pp. 55-64 of this Brief. Doubtless when the statute is again declared unconstitutional the state courts will proceed to amend it again in such respect as in its opinion will make the statute constitutional and so on ad infinitum. This is the necessary consequence of the assumption of legislative power, for if the state courts have the power to amend this statute once, there is no limitation upon their power to do so any number of times and in such manner and with such regard as they choose.

As was said in Davis v. Wallace, 257 U. S. 478 (1922) so with reference to the instant judgment: ". . . to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally

be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these . . . corporations belong. Of course we cannot so hold." In this case the United States Supreme Court said ". . . . an existing statute cannot be recalled or restricted by anything short of a constitutional enactment." The judgment of the state court is not "a constitutional enactment".

The state courts have declared an intent on the part of the legislature in the enactment of the statute which, as hereinbefore pointed out, is not only contrary to the language of the statute, their prior decisions, but also to the decision of the United States Supreme Court in this case. This court has said in its analysis of the statute and its review of the decision and judgment of the state Supreme Court (296 U. S. 113):

> "We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the state, but where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect.
>
> "It is clear that the tax is not measured by each shareholder's aliquot proportion of all the assets of the company."

Continuing its analysis of the intent and meaning of the statute this court said, inter alia, "The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax

them twice." Continuing the Court says: "The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It exempted them because to include them in the base would be in effect to tax them a second time." This Court, it is seen, declared what the law does, what the legislature has done by this statute. Federal questions being involved, this court declared the meaning and intent of the state legislature, its operation and effect, and held the statute void. Interpretation and construction of the statute ceased at this point. Judicial process thereafter was confined to compliance with the decision. The constitutional defects of a state statute can be cured by nothing short of a constitutional enactment by the state law-making body.

The state courts under the guise of obeying the mandate of the United States Supreme Court amend the statute by judicial decree. This is error. This is judicial legislation.

The opinions of the state courts indicate that they predicate their authority to amend the statute upon the dissenting opinion (296 U. S. 113). Such interpretation of the dissenting opinion is unwarranted.

The dissent is founded upon an erroneous conception of the provisions of the 1907 statute. The writer of the dissenting opinion states: "The attack is thus confined to amendments of the act which were placed upon the statute books in three years, (1923, 1927, 1929), for there was no deduction of any kind under the act as first adopted in 1907." This is an erroneous statement as a reading of the provisions of the Act of 1907 discloses and as the decisions of the state Supreme Court cited in the opinion of the Supreme Court of the United States, to wit, Commonwealth v. Trust Co., 237 Pa. 353, 355, 356 (1912) and Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921), both of which decisions construed the

1907 act, affirm. (See also Commonwealth v. Mortgage Trust Co., 227 Pa. 163 (1910).)

The main provision of the 1907 act, referred to in this Brief as the second proviso, directs the deduction of "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares". This measure of tax is in precise terms that of the Act of 1923. It is in the first proviso of the 1907 statute that the measure of tax is fixed at the net asset value of the shares *but* this first proviso is not applicable until after March 1 of each year and then to such trust companies only as have not paid their tax on or before such first day of March, at which time there may be none such. This first proviso is the conditional proviso of the statute, not being applicable until after March 1 and then to such trust companies only as have not paid the tax measured by the second proviso. The first proviso increases the tax by denying deductions and also denies the exemption from other taxation allowed when the tax is paid on or before March 1 under the second proviso. (Commonwealth v. Trust Co. of Pgh., 237 Pa. 353, 355 (1912).) This second proviso cannot be stricken from the statute without striking from the statute the effect of its application, for the statute provides that if the payment of the tax be made on or before the first day of March in each year "the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

Any suggestion of choice of method of removing the established discrimination by judicial process is faulty. There is no distinction between the 1907 statute and the acts of 1923, 1927 and 1929, for the same discrimination exists under each of these statutes, the first act of 1907 and the succeeding acts of 1923, 1927 and 1929. Hence it is that any conclusion that the 1907 act is a valid enactment, that the invalidity of the 1923, 1927 and 1929

statutes reestablishes the imposition of a valid tax under authority of the 1907 statute is unsound. So the state courts have ruled for the petition of the Commonwealth was denied because of the unconstitutionality of these statutes (R. 100, 106.)

Let us analyze this dissent in the light of the rationalization of the state courts and the contention of the Commonwealth made in support of its petition for the imposition of the tax under the first proviso of the Act of 1907.

The dissent cites Eberle v. Michigan, 232 U. S. 700, 705 (1914); Davis v. Wallace, 257 U. S. 478, 484, 485, (1922); Truax v. Corrigan, 257 U. S. 312, 342 (1921), in support of the proposition that the acts of 1923, 1927 and 1929 are amendatory of the Act of 1907, "separable, even though invalid, . . ." This seems to lead to the conclusion that the Act of 1907 thereby becomes law. The invalidity of the 1907 act has been shown. The dissent concludes that the *state* has a choice. It is said, "If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. . . . On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force."

Observe that what the dissent holds is that the state has such choice. The state courts, however, proceed to amend the 1929 statute by judicial decree with the thought that by an amendment allowing additional deductions and by its "book-value-permanent-investments-flat and proportionate deduction method of settlement" they have changed the measure of tax and thereby removed the discrimination. The procedure followed by the Dauphin County Court not only violates the decision of the United States Supreme Court, state and federal constitutional provisions, but also runs counter to the dissent. The lower court

admits the unconstitutionality of the acts of 1907, 1923, 1927 and 1929, holds them void as enacted and then proceeds to amend the 1929 statute and to apply it to the appellant as amended, though manifestly what the writer of the dissent meant, by saying that the state must either maintain the deductions or cancel them altogether, was that the state had to choose between one or the other method by the enactment of a constitutional statute operating prospectively.

The Commonwealth urged judicial legislation denying all deductions. (R. 94.) It said that, since the acts of 1923, 1927 and 1929 are unconstitutional as is the second proviso of the 1907 act, the court should hold the first proviso of the Act of 1907 valid and impose tax thereunder, thereby denying all deductions and depriving trust companies and their shareholders of the exemption from other taxation allowed upon payment of tax imposed by the second proviso. The insuperable difficulty here is that the second proviso of the Act of 1907 is the main provision of the statute, that without it the legislature would not have passed the statute, (Com. v. Trust Co., 237 Pa. 353, 355 (1912).) that the second proviso was a part of the act at the time of its enactment and that the decisions cited in the dissent (Eberle v. Michigan, supra, Davis v. Wallace, supra, and Truax v. Corrigan, supra) establish conclusively that the Act of 1907 is void in its entirety upon the same grounds which made void the later statutes. So the state courts held.

No court can amend the 1929 act by adding words of limitation, as do the state courts, nor can any court strike from the 1907 statute a provision which was in the statute when it was enacted, there being no doubt that the legislature intended that the meaning of the other provisions was to be restricted accordingly, as the Commonwealth asked the Dauphin County Court to do. What the state courts have done is to amend the statute by changing the

measure of the tax, thereby exercising a law-making power. What the Commonwealth petitioned the Dauphin County Court to do was to amend the 1907 statute by striking therefrom the unconstitutional second proviso and to sustain the statute thus mutilated, an act which is likewise the exercise of law-making power, similarly without constitutional authority.

If such power did exist in any court it could constitutionally be made to operate prospectively only, for a method of taxation could not be applied to the appellant differing from that applied to all other trust companies in the same tax year without violating the uniformity clause of the state constitution (Article IX, Section 1) and the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the United States Constitution. Such state and federal constitutional provisions are violated by the judgment of the lower court applying its new conception of legislative intent in the enactment of the 1929 statute. (Commonwealth v. Del. Div. Canal Co., 123 Pa. 594, 623 (1889), Appeal of Fox and Wife, 112 Pa. 337, 353 (1886), Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 560 (1902), Frost v. Corporation Commission, 278 U. S. 515 (1929).)

The measure of tax prescribed in the 1929 statute was in furtherance of the legislative policy to avoid double taxation and to foster the growth of manufacturing, laundering and meat-packing corporations. Obviously to change the measure of tax is to change the policy of the state. Such power is in the state legislature alone.

To apply the measure of tax of the conditional first proviso of the 1907 act without the limitation of the second proviso of the same act is to legislate by prescribing a measure of tax which the legislature never mandatorily applied to trust companies. Such amendment deprives the shares issued by the trust companies and so much of the capital stock, surplus, profits and deposits of

the trust companies as shall not be invested in real estate of the exemption "from all other taxation under the laws of this Commonwealth", an exemption confined to and granted solely by this second proviso, an exemption which is the effect of the payment of the tax under the acts of 1923, 1927 and 1929. To hold that this second proviso with its measure of the tax and with the exemption from all other taxation upon compliance with the terms can be stricken from the act upon the ground that the legislature would have passed the 1907 statute without it is to hold that the legislature did not pass the act as an entirety and is to contradict every legislative act relating to the taxation of trust companies and their shares and to negative the express ruling of the state Supreme Court in Commonwealth v. Trust Company, supra, 237 Pa. 353, 355 (1912).

To choose to amend by allowing additional deductions is likewise to change the legislative policy by changing the measure of tax. Again we see that such change is an act of legislation. Whichever alternative is chosen, the change is a change in the law.

Courts have no such power of choice. Such power of choice cannot be exercised by judicial decree changing the measure of tax. What is the source of such power of choice in a court? Where is the standard in accordance with which the choice is to be made? In the 1929 act? If not there, where?

To exercise such choice without an objective standard prescribed by the legislature is arbitrary. No administrative or judicial officer has the power to exercise a personal choice, an undefined and ungoverned discretion. If the standard exists, is it to be found in the 1929 statute? So, seemingly, the state court holds, for it is such statute which it changed and as changed applied to the appellant by making a new tax settlement founded upon a new and a different state of facts from that upon which the original settlement was founded. A reading of the statute shows

that no standard is to be found within its provisions, for each of the stated alternatives of choice was designedly omitted from the statute.

The legislature did not delegate such power of choice to the courts by the 1929 act and if it had, it would be an unconstitutionl delegation of law-making power. Schechter v. United States, 55 Supreme Court Reporter, 837 (1935). Has not the state legislature exercised its powers of choice by the Act of July 28, 1936, P. L. 73, a statute effective in the year 1936, and therefore not applicable to the year here in question?

It is respectfully submitted that the judgment of the state Supreme Court is judicial legislation, that the judgment of the state Supreme Court should be reversed and that judgment should be directed to be entered in favor of the appellant with costs.

4. There is an intended and actual taxation of and a discrimination against United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds by this statute as it has been construed in the tax settlement made against the appellant and embodied in the final judgment of the Supreme Court of Pennsylvania.

The new judgment is unconstitutional because the statute under the alleged authority of which it entered such judgment is unconstitutional. The new judgment is unconstitutional also because it violates the due process of the law and equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States and the federal statutes recited in the Assignments of Error and thereby establishes the unconstitutionality of the 1929 statute upon the same grounds. This is demonstrated by the judgment itself.

What is the formula which this new judgment applies? What are its ingredients? What are the principles upon which it is founded? To learn the answer to these

questions one must turn to the cases of Commonwealth v. Provident Trust Company of Phila. (40 Dauphin Co. Repts. 146 (1935); 41 Dauphin Co. Repts. 1 (1935); 319 Pa. 385 (1935)). By these decisions this new method was applied to the Provident Trust Company for the years 1928, 1929 and 1930 the last of which is the year here in question, the statute imposing the tax in 1928 being the 1927 act and in the years 1929 and 1930 the Act of 1929. The measure of tax in the 1927 and 1929 statutes is the same.

That the decision in the Provident Trust Company case is unconstitutional is evident upon a reading of the opinion of the Supreme Court of the United States. The latter court referred to the Provident Trust Company decision in the body of its opinion and in marginal notes 13 and 14.

By this decision in the Provident Trust Company case, supra, it was recognized that not only were national bank shares to be deducted but that the federal reserve bank shares were to be deducted from the value of the net assets at their full value, i. e. "flat", without any necessity on the part of the trust company to establish the fact that such shares were purchased out of the amount of capital paid in, surplus and undivided profits, though the court did hold that such shares fall within the statutory language defining the class of exempt and deductible assets. Here is patent discrimination against the non-taxable assets deducted "proportionately".

The sole difference between the formula and calculation applied in the Provident Trust Company case and that applied by this new judgment in the instant case lies in additional deductions consisting of non-taxable assets which in the instant case consist of United States bonds and bonds of federal agencies and instrumentalities, the deduction of which is made by a "proportionate" method of settlement.

In this cited decision and its second decision upon exceptions in the same case we learn that the entire formula and method of settlement designed to be applied to all trust companies is founded upon a presumption, a presumption which may be substantiated by fact in the case of one or more companies in any one year and in the case of none other. Here we read that it is a "fair presumption" that all of the capital stock, surplus and undivided profits are "permanent investments", that all other investments are of deposits (40 Dauphin Co. Repts. 169), that all bonds and shares of stock are "permanent investments", and therefore all of the capital stock, surplus and undivided profits consists of bonds and stocks (41 Dauphin Co. Repts. 4), that "commercial paper" and "quick assets" (an undefined term) (40 Dauphin Co. Repts. 169) and notes (41 Dauphin Co. Repts. 4), are not "permanent investments", that "the short term investments such as notes are made out of deposits" (41 Dauphin Co. Repts. 4) which may however include also "permanent investments" if the amount of the "permanent investments" is in excess of the capital stock, surplus and undivided profits (40 Dauphin Co. Repts. 169; 41 Dauphin Co. Repts. 4). Presumption upon presumption, without a fact in their support. This is the general rule founded upon the "fair presumption" in a particular case. Apparently the invalidity of arguing from a presumption based upon a presumption and from a particular to a general conclusion is overlooked by the court. (40 Dauphin Co. Repts. 146 (1935); 41 Dauphin Co. Repts. 1 (1935); 319 Pa. 385 (1935).)

Now turn to the instant case and note the result. The opinion of April 24, 1936 declares the formula. The formula is set out in full on page 320 of 42 Dauphin Co. Repts. (317) (a) (b) (c) (d). The judgment of January 22, 1937 (43 Dauphin Co. Repts. 260, 261) finally applies it though to learn the mechanics of the calculation one

must look for it in the opinion filed January 18, 1937 (43 Dauphin Co. Repts. 258, 259, 260). (R. 100, 152.)

Observe what is done. National bank shares are deducted "flat". None other is so deducted. What of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds? What of shares exempted by the terms of the statute of 1929? They are deducted proportionately by the formula applied by the following calculation:

$$\frac{418{,}650}{2{,}158{,}045} \times 286{,}121 + 35 = \$\,55{,}541$$

What do these figures represent? What are they in reality? The numerator, 418,650, is defined by the court on page 320 of 42 Dauphin Co. Repts. (317) in subparagraph 2(a), also on page 322. (R. 102, 104).

The denominator, 2,158,045, by subparagraph 2(b), page 320 and also on page 322. (R. 102, 104).

The multiplicand, 286,121, by subparagraph 2(c), page 320 and also on page 322. (R. 103, 104).

The figure 35 by subparagraph 2(d), pages 320 and 322. (R. 103, 105).

The numerator therefore is the book value of capital stock, surplus and undivided profits less book value of national bank shares which are deducted "flat".

The denominator therefore is the book value of all permanent investments less book value of national bank shares which are deducted "flat".

The multiplicand is said to be the book value of the shares to be apportioned. (42 Dauphin Co. Repts. 320 (c)) (R. 103). This is changed by the addition of the alleged book value of the United States securities, Philippine

Islands bonds and Joint Stock Land Bank bonds. (42 Dauphin Co. Repts. 322 (c)) (R. 104).

The result, $55,541., is said to be the actual value deducted by reason of the ownership by the applicant of exempt shares defined in the statute (not including national bank shares) of the value of $135,787. and United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of the value of $151,208. (R. 17.) The actual value, $55,541., is determined by the application of such book value fraction to such book value multiplicand and is converted from a book value into an actual value by the addition of the figure, 35, which is said be an appreciation (See 43 Dauphin Co. Repts. 258, 259) to which the fraction is not applied. All of this is explained in the Opinion filed April 24, 1936 and again in the Opinion filed January 18, 1937. (R. 100, 152).

The language of the court is clear upon the following points, to wit, the denominator of 2,158,045 is said to be the "book value" of all "permanent investments" exclusive of an alleged "book value" of the national bank shares, "permanent investments" consist of bonds and stocks, hence the denominator of 2,158,045 includes the alleged "book value" of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds. Thus it is manifest that the federal securities are taxed and discriminated against.

By this formula and calculation the federal securities are included in the base and measure of the tax. The denominator is increased by the inclusion of their value.

The greater the denominator the less is the result of its application to the exempt multiplicand value of $286,121. and the less the exemption or deduction allowed. The less the deduction the greater the tax imposed and the judgment entered. Is this not a mathematical demonstration of the fact that the United States securities are included in the base of the tax, that the tax liability and the tax burden is increased by reason of their ownership?

The conclusion of law 5, (Opinion, April 24, 1936, 42 Dauphin Co. Repts., 317, R. 104), declares that the value of the United States securities and the securities of federal agencies and instrumentalities is not to be deducted though the full value of other assets is deducted. The full value of national bank shares are deducted "flat" and the full value of federal reserve bank shares are deducted "flat", (Commonwealth v. Provident Trust Company, 40 Dauphin Co. Repts. 146 (1935); 41 Dauphin Co. Repts. 1 (1935); 319 Pa. 385 (1935), Com. v. Girard Trust Co. R. 106; 327 Pa. 135 (1937)), irrespective of whether or not it be established as a fact that they were purchased out of capital stock, surplus and undivided profits. Manifestly there is discrimination against these non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds which are deducted "proportionately".

This new method of settlement applies the proportionate method of deduction as did the method applied to trust companies in the year 1930. The new differs from the old in its use of "book values" and a new factor styled "permanent investments". In both methods tax is imposed upon and tax liability is increased by reason of the trust companies' ownership of non-taxable federal bonds and the bonds and shares of stock of federal agencies and instrumentalities. In both the non-taxable federal assets "are figured in the base of the tax", and therefore as this court said, "it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely and by reason of ownership of such federal securities." If to avoid the taxation of national bank and federal reserve bank shares and a discrimination against them their value must be deducted "flat", i. e. their full value must be deducted from the value of the net assets, is not the partial deduction of the federal securities a taxation of the portion not deducted? If national bank shares, and other assets held exempt under the express terms of

the statute are deducted "flat", i. e. at their full value, are not the partially deducted non-taxable federal securities discriminated against?

Turn to the method of settlement applied by the taxing officials and approved by both state courts. (November 24, 1933 and June 30, 1934). Observe that the figures are all actual values, all set forth in the sole facts before the courts (R. 14, 18).

Turn now to the method of settlement applied by the court in its new judgment of April 20, 1936 explained in the opinion filed April 24, 1936 (R. 100). Observe that the explanation of the method calls for the use of book values and the value of undefined "permanent investments" while the calculation actually applied in this judgment uses actual values. Thus the theoretical formula and the calculation determinative of the judgment entered are contradictory. If the theory be valid, the judgment is invalid. Later the court holds this judgment invalid and proceeds to make it conform to its theoretical formula by its judgment of January 18, 1937. Let us analyze this later judgment.

The judgment of January 18, 1937, says the court, is based on "book value" and the "permanent investments" factor, figures and factors involving values. Of these values there is no evidence. Realizing this fact, the court without hearing and without authority introduces new evidence and changes the facts. It says it got the figures from a report. This is not in evidence. This is done in violation of the 1929 statute, and in violation of judicial decision. It is contrary to its answer to the appellant's Exception 5. (R. 129, 160). This point has been discussed hereinbefore and will not be repeated. Tax cannot be imposed by the use of any values other than actual values. Such values are set forth in the Stipulations (R. 14, 18). What "permanent investments" are does not appear. The term is not defined. It is not an ingredient of the

statute. What is significant furthermore is that the "permanent investment" values are not actual values.

Based upon alleged facts not in evidence, not applied by the taxing officials in the original settlement affirmed by the judgments of the state courts and reversed by the United States Supreme Court, the new judgment stultifies itself; it is said to be a revision of the original judgment in obedience to the mandate of reversal, yet it changes the facts and amends the statute in patent violation of the mandate.

The final judgment of January 22, 1937 differs from the judgment of January 18, 1937 solely in the interest calculation, the factors and valuations in both are the same.

At this point attention is called to the extent of the discrimination exemplified and established in the judgment in the Provident Trust Company cases, 40 Dauphin County Repts. 146, 177, 182 (1935); 41 Dauphin Co. Repts. 1 (1935). The Provident Trust Company settlements and appeals covered the tax years 1928, 1929 and 1930. The tax year in question in the Schuylkill Trust Company case is that of 1930. Turn to the final judgment of the Dauphin County Court, 41 Dauphin Co. Repts. 1, at pages 8 to 12, incl. The actual value of the net assets is $21,385,884. The deductions allowed totalled $7,080,330. Tax is imposed upon the difference between these two sums, to wit, $14,305,554. The allowance of a deduction of $7,080,330. for one tax year is a reduction of tax for such period in the amount of $35,401.65. The deductions allowed were in excess of thirty-three per centum of the value of the net assets of the trust company. Tax was measured by an asset value less than two-thirds of the net asset value. In cases of trust companies owning no favored exempt shares of stock under the express language of the statute tax is measured by their full net asset value.

The net asset value of the Schuylkill Trust Company ($466,914.) is two and one-tenth per centum of the net

asset value of the Provident Trust Company ($21,385,884). The deduction allowed the Schuylkill Trust Company ($8,886.) is twelve-one hundredths of one per centum of the Provident Trust Company's deduction of $7,080,330. Note that the value of the net assets of the Provident Trust Company ($21,385,884) is upwards of 46 times that of the Schuylkill Trust Company ($466,914.) and that the deduction allowed the Provident Trust Company ($7,080,330.) is 793 times the deduction allowed the Schuylkill Trust Company ($8,886.) under the judgment of this court entered June 30, 1934 and is 93 times the deduction allowed under the new tax settlement and judgment of the Dauphin County Court ($75,743.) entered January 22, 1937.

Turn now to the Girard Trust Company judgment (R. 106) (42 Dauphin Co. Repts. 297 (1936). The actual value of the net assets of the Girard Trust Company was fixed at $22,062,513. The total deductions allowed were $12,201,893. The measure of tax was the difference between these two amounts, to wit, $9,860.62. The tax imposed amounted to $49,303.10. The tax deduction and exemption allowed was $61,009.46. Trust companies owning no such favored assets were taxed upon the full net asset value. Any such trust company whose net assets were the equivalent of the Girard Trust Company's is subjected to tax in the amount of $110,312,565. Note that the total deduction allowed ($12,201,893.) is in excess of fifty-five per centum of the net asset value ($22,062,513.) The tax was imposed by a measure of tax of less than forty-five per centum of the value of the net assets. The value of the net assets of the Girard Trust Company ($22,062,513.) is 47 times that of the Schuylkill Trust Company ($466,914.) while the deduction allowed the Girard Trust Company ($12,201,893.) is more than 1373 times that allowed the Schuylkill Trust Company ($8,886.) under the judgment of this court entered June 30, 1934 and is more

than 161 times the deductions allowed under the new tax settlement and judgment of the Dauphin County Court ($75,743.) entered January 22, 1937.

Comparing the methods of settlement and the effect thereof as established by the judgments in the Provident Trust Company case and in the Girard Trust Company case, we find that while the value of the net assets of the Girard Trust Company ($22,062,513.) exceeds the value of the net assets of the Provident Trust Company ($21,385,884.) in the amount of $816,009., the deduction allowed the Girard Trust Company ($12,201,893.) exceeds the deduction allowed the Provident Trust Company ($7,080,330.) in the amount of $5,121,563. The excess deduction allowed the Girard Trust Company in the amount of $5,121,563. is more than 6 times the excess of the value of the net assets of the Girard Trust Company over the value of the net assets of the Provident Trust Company ($816,009.).

The total amount of deductions allowed the Provident Trust Company was $7,080,330., $6,929,696. of which was a "flat" deduction and the remainder, $150,634., was a "proportionate" deduction. The entire amount of such deductions consists of the shares of stock defined in the statute. The total amount of deductions allowed the Girard Trust Company was $12,201,893., $877,141. of which was a "flat" deduction for shares of national bank and Federal Reserve Bank stock and the remainder, $11,324,752., was a "proportionate" deduction covering exempt shares of stock defined in the statute and United States securities. What the full value of these assets is for which a "proportionate" deduction was allowed does not appear by the opinion and judgment of the court. A point to be observed in this connection is that the Girard Trust Company might have secured a deduction of the full value of these assets for which a "proportionate" deduction was allowed in the amount of $12,201,893. had these assets been "earmarked and set up" as investments "made out of the capital account" (41 Dauphin Co. Repts. 3), for it was

recognized in the Provident Trust Company case that by so earmarking and setting up exempt assets the right to a "flat" deduction is established. (See Commonwealth v. Provident Trust Co. of Phila., 40 Dauphin Co. Repts. 146, 166 (1935); 41 Dauphin Co. Repts. 3 (1935); 319 Pa. 385 (1935).)

These comparisons disclose gross discrimination and inequality. Here is an entire lack of uniformity. The appellant owned United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of a value of $151,207. Under the settlement of tax and judgment of the state courts 19 per centum of their value was deducted. Had the appellant invested this sum in Federal Reserve Bank shares or national bank shares or both, the entire sum of $151,207. would have been deducted with a consequent reduction of tax liability. Surely a taxing statute productive of such results cannot be made constitutionally valid by labeling the tax imposed by the statute a tax upon shares of stock issued by trust companies.

It is submitted that under this new application of a new meaning and intent ascribed to the legislature by its enactment of the 1929 statute, the statute is likewise unconstitutional and void upon the same grounds as those upon which this Court held it unconstitutional and void.

5. If the tax imposed by the statute as construed and applied in the tax settlement made against the appellant is a tax upon shares qua shares, a personal levy against the shareholders, the state is without constitutional authority to impose such tax upon the shares owned by non-residents of the state.

This new judgment imposes the tax upon the shares of the trust company owned by non-residents. The judgment is invalid for the reasons urged in this respect at the original argument resulting in the decision filed November 11, 1935. Such taxation violates the due process and

equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, for it is the taxation of property whose situs is in states other than Pennsylvania. The 1929 statute is a revenue statute. It is not a statute regulating the issues of shares of stock of trust companies and thereby fixing their taxable situs. Hence Corry v. Baltimore, 196 U. S. 466 (1905), is not in point.

The contention of the appellant that, if the tax be one upon shares as such, the Commonwealth is without authority to impose and collect a tax upon shares owned by residents of states other than Pennsylvania, was argued and discussed in the Brief of Appellant filed with this court in the appeal to No. 3, October Term, 1935 and reference is made upon this point to such Brief of Appellant.

This court held with reference to this contention that "In view of the grounds of our decision we find it unnecessary to pass upon this contention", thus indubitably demonstrating that this court held the 1929 statute unconstitutional and void.

The contention of the appellant is renewed and reference is made to the Brief heretofore filed with this court.

It is respectfully submitted that the exclusive situs for the taxation of shares of stock is the domicile of their owner and that the taxation by the state of Pennsylvania of shares of stock owned by non-residents of the state is forbidden by the Fourteenth Amendment to the Constitution of the United States.

Before leaving the consideration of this judgment observe that the state court has imposed an interest charge upon costs awarded the appellant by the mandate of this court in the amount of $344. The decision of this court was filed November 11, 1935. These costs at the latest were owing as of such date. The state court charges in-

terest to January 22, 1937, and upon such date credits the appellant with such sum of $344., thus charging interest on such sum at the rate of 6 per centum from November 11, 1935 to January 22, 1937. The judgment of this court was definitive. Such costs were payable as such and are not paid by a credit allowance upon a non-definitive judgment of a state court.

VI. Conclusion.

State administrative officials and the state Supreme Court heretofore never expressed a doubt as to the meaning and intent of these acts of 1907, 1923, 1927 and 1929. Neither the tax collectors nor the court varied from the conclusion that the sole deductions allowed by these statutes are the shares of stock defined in terms by their provisions.

Deductions in addition to those allowed by the acts of 1907 and 1923 were allowed when the legislative enactments of 1927 and 1929 expressly granted them; not before. Legislative enactment in the furtherance of the state taxation policy determined their allowance. Being exemptions, administrative officials and state courts confined their allowance strictly in accordance with the words of the statutes.

Legislative history is to the same effect. A reading of these statutes in the order of their enactment demonstrates the same truth. Additional deductions were the result of legislative enactments. The later statutes of May 31, 1933, Pamphlet Laws 1132 and July 28, 1936, Pamphlet Laws 73 confirm the fact that to add to or to subtract from the deductions expressly granted in the statute of 1929 is to legislate and that such function is that of the General Assembly of the Commonwealth.

The opinion of this court and of the dissent is the same as to the extent of the deductions allowed by the statute. All members of the court were in accord in the

view that the 1929 statute allowed no deductions other than those expressly granted. They differed in the effect of the United States Constitution. This court reversed the judgment of the state court because it was founded upon a statute which was discriminatory, therefore unconstitutional and void. The dissent agreed that the judgment was invalid; agreed that the statute was discriminatory but expressed the view that the discrimination was not hostile.

That the United States Supreme Court upon appeal, federal questions being raised, is the final arbiter as to the effect of the United States Constitution and federal statutes is a proposition which is not debatable. A contrary conclusion is destructive of the federal government. Under a contrary conclusion congressional statutes and the United States Constitution become what the court of last resort of each of the states thinks them to be.

There must be uniformity in the application of constitutional provisions. Finality and uniformity in the application of federal constitutional provisions are not to be found in forty-eight different and independent state courts.

There must be an end to the exercise of the judicial function and the operation of the judicial process in a particular case, otherwise the judicial administration of justice becomes destructive of its purpose and, in cases where the state with its limitless resources is a party in a proceeding against an individual citizen or a group of citizens or a corporation, it becomes an instrument of oppression. If there be power to do that which the state court has done in this case by its latest judgment, it has the same power upon reversal of this, its latest tax settlement and judgment, to express another and different view as to the meaning and intent of the legislature in the enactment of the statute, thereupon make another tax settlement and direct the entry of another judgment which must be pursued

from court to court until it again comes before this court. This process may continue throughout the life of the state and not end until either the estate of the person is exhausted or the corporate body bankrupt. The mandate of the Supreme Court of the United States cannot be made the means productive of such results.

This court was the final judge of the federal questions raised, the nature and operation of the tax imposed by the 1929 statute and the effect of the federal statutes and of the provisions of the United States Constitution. No state court has the power to alter such decision. The Act of April 25, 1929, Pamphlet Laws 673, is void and the judgment based thereon is void for this court has so decided.

It is submitted that the 1929 statute is unconstitutional and void as it has been construed and applied against the appellant by the new judgment entered against it.

Under this new judgment, as under the old, the thing taxed in form is not the subject aimed at; if it were, tax liability would not vary by reason and because of the nature of the assets owned by the trust company which issues the shares of stock.

Under the new construction of the state statute, it is submitted, non-taxable assets owned by trust companies are subjected to burdens by reason of their use as a measure of value to which the rate of tax is directed to be applied. They are discriminated against by their use as a measure of value and the elimination and non-use of Federal Reserve Bank shares and national bank shares and other assets deducted at their full value. These burdens and discriminations are not by chance; they are intended, as the formula and calculation applied by the judgment disclose.

Under the new construction of the state statute, it is submitted, the mathematical calculation used and embodied in the judgment establishes the fact that the statute

as construed and applied prescribes a different rate of tax for each member of the class of trust companies made subject to the act, the rate varying as the nature of the assets owned changes and deductions are made by either the "flat" or the "proportionate" method, though the value of the assets and of the shares remains the same.

It is submitted, that such taxation is beyond the power of the state to impose, that, irrespective of any provision of a congressional statute or of the Constitution of the United States, such system of taxation by a state is beyond its power because it infringes upon the paramount sovereignty of the United States.

It is respectfully submitted that the said Act of April 25, 1929, Pamphlet Laws 673 is unconstitutional and void, that the judgment of the state Supreme Court should be reversed and that judgment should be directed to be entered in favor of the appellant with costs.

JOHN ROBERT JONES,
Counsel for the Appellant.

APPENDIX.

Act Approved June 13, 1907, P. L. 640.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . . and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. . . . : And provided further, That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

Act Approved July 11, 1923, P. L. 1071.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . . ; and thereupon it shall be the duty of the Auditor

General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together *so much of* the amount of capital stock paid in, the surplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares. . . .: And provided further, That in case any such company shall . . . pay said tax into the State Treasury . . . *as hereinbefore provided,* the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

ACT APPROVED MAY 7, 1927, P. L. 853.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . .; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, *or relieved from the payment of capital stock tax* or tax on shares, and dividing this amount by the number of shares. . . .: And provided further, That *upon the payment of the tax fixed by this act* into the State Treasury the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth."

ACT APPROVED APRIL 25, 1929, P. L. 673.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . .; and thereupon it shall be the duty of the *Department of Revenue* to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. . . . Provided . . . That upon the payment of the tax fixed by this act into the State Treasury, *through the Department of Revenue,* the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth."

The following are pertinent portions of the state statute under authority of which the national bank shares owned by the appellant were taxed:

ACT APPROVED APRIL 25, 1929, P. L. 677.

"Section 1. Be it enacted, &c., That from and after the passage of this act every bank or savings institution having capital stock, incorporated by or under any law of this Commonwealth, or under any law of the United States, and located within this Commonwealth, shall, . . . It shall be the duty of the *Department of Revenue* to assess such shares for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of the State, that is to say, at the rate of four

mills upon each dollar of the actual value thereof; the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. . . .; Provided That in case any bank or savings institution having capital stock, incorporated under the law of this State or of the United States, shall collect, annually, from the shareholders thereof said tax of four mills on the dollar upon the actual value of all the shares of stock of said bank or savings institution, according to the rule hereinbefore stated, that have been subscribed for or issued, and pay the same into the State Treasury, *through the Department of Revenue,* on or before the first day of March in each year; the shares and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate, shall be exempt from local taxation under the laws of this Commonwealth; and such bank or savings institution shall not be required to make any report to the local assessor or county commissioners of its personal property owned by it in its own right for purposes of taxation, and shall not be required to pay any tax thereon."

ACT OF CONGRESS FEBRUARY 6, 1905, (c. 453, 33 Stat. 689).

"Be it enacted . . . That all bonds issued by the government of the Philippine Islands, or by its authority, shall be exempt from taxation by the Government of the United States, or by the government of the Philippine Islands or of any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia."

ACT OF CONGRESS JULY 17, 1916, (c. 245, 39 Stat. 380, Section 26).

"Sec. 26 . . . farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

". . ."

REVISED STATUTES OF THE UNITED STATES, Section 3701; UNITED STATES CODE, Title 31, Section 742.

"Except as otherwise provided by law, all stocks, bonds, Treasury Notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."